In The
Supreme Court of the United States.

OCTOBER TERM. 1902.

ROBT. L. WINEBRENNER,
Plaintiff in Error.
vs.
EDWARD C. FORNEY,
Defendant in Error.

Cause No. 409.

BRIEF OF DEFENDANT IN ERROR ON MERITS.

STATEMENT.

On September 23d, 1893, Edward C. Forney made homestead entry at the Perry, Oklahoma land office on the land in controversy. On October 7th 1893, Robert L. Winebrenner filed contest against the entry of Forney, alleging that Forney was disqualified, because he entered the race into the Cherokee Outlet on September 16th 1893, from the Ponca Indian reservation in

Oklahoma Territory. This contest was waged through the Land Department until it was finally determined by the Secretary of the Interior who decided the case in favor of Forney and held that Forney was not disqualified to enter this land because he made the run on the opening day from the Ponca Indian Reservation, and the land was awarded to Forney, who complied with the homestead law, made final proof under his entry and received patent for the land.

On September 26th, 1900, Robert L. Winebrenner commenced this action against Edward C. Forney in the District Court of Kay County, Oklahoma Territory, to recover the land and to obtain a decree that Forney held the land in trust for Winebrenner on the ground that the Secretary of the Interior had erred in matter of law in holding that Forney's run from the Ponca Reservation was legal. A second amended petition was afterward filed to which a general demurrer was interposed and sustained, and Winebrenner's cause dismissed. On appeal to the Supreme Court of Oklahoma this decree was was affirmed, and from this judgment plaintiff again appeals to this court.

ARGUMENT.

The demurrer to the second amended petition which was sustained by the trial court and by the Supreme Court of Oklama is in three paragraphs, and under it we presented there, and desire to present here, one question, that is:

we affirm that the petition does not contain a sufficient statement of facts to constitute a cause of action by the plaintiff against this defendant, or to entitle the plaintiff to the relief prayed for. This involves but one point and that is, that the defendant, Edward C. Forney, was not disqualified to make homstead entry on the land described in the amended petition, because of the fact that he entered Cherokee Outlet on September 16, 1893, from the Ponca Indian Reservation.

The contention of the plaintiff is that the Ponca Indian Reservation was a part of the Cherokee Outlet, and that Edward C. Forney, at 12 o'clock, noon, central standard time, September 16, 1893, being within the Ponca Indian Reservation, was in the country known as the Cherokee Outlet, and which was then about to be opened to settlement. Our contention is that Edward C. Forney was in a place where he had a right to be and was not violating any provision of the President's Proclamation opening the Cherokee Outlet to settlement.

The provisions of the President's Proclamtion making regulations on the subject are as follows:

"Said land is to be opened as herein proclaimed, shall be entered and occupied only in the manner and under the provisions following, to-wit: A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation,

is hereby temporarily set apart for the following purposes and uses, viz: Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. *Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made, nor shall any settlement rights be gained thereby.*"

Now, if Edward C. Forney is disqualified, it must be because he has violated this language just quoted from the President's Proclamation, and if he occupied land which the President's Proclamation did not prohibit him from occupying, then he is not disqualified. If Edward C. Forney started into the Cherokee Outlet on September 16, 1893, after 12 o'clock noon from the one hundred foot strip, or from a further distance from the lands, then being open to settlement, he is not disqualified.

The Interior department find that he entered from the Ponca Reservation and that he did not enter the Cherokee Outlet, the territory opened to settlement, until the time stated in the President's Proclamation. So that the one question is, was the one hundred foot strip along the east side of the Cherokee Outlet which opened to settlement on September 16, 1893, or was the one hundred foot strip on the 96th meridain? The President's Proclamation, it seems to us,

answers this question, for its language is quite clear. And where the language of an Act is clear it needs no construction.

In the case of *Yerk* v. *The United States*, 173 U. S., 439, Mr. Justice McKenna, speaking for the Supreme Court, said:

"The answer is ready and may be brief. The Act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other statutes or from the practice under other statutes. The rule is elemental that language which is clear needs no construction."

Now, the language of this provision of the Proclamation is clear. It would indeed seem that the President of the United States and his cabinet officers would not present language declaring a rule of action for the common people of the country to pursue when taking for themselves homesteads that were given of the bounty of the Government, other than in clear terms.

Therefore the President said that they might make the start into this country from a "strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation." What need of construction for such language? It is a strip of land one hundred feet in width and that strip of land is located "around." That means entirely around, not partly around, but completely around; and that strip of land is located "immediately within the outer boundaries of the en-

tire tract of country to be opened to settlement" not on a part of the outer boundary of the entire tract of country, but around and immediately within the outer boundaries of the entire tract of country to be opened to settlement. Where then, would this strip of land be with reference to the Ponca Indian Reservation? It was the "country known as the Cherokee Outlet" that was being opened to settlement. If all of the lands west of the 96th meridian were being opened to settlement, then of course the line on the east of the coverted lands was somewhere east of the Ponca Indian Reservation. But if the country "known as the Cherokee Outlet when the President made the Proclamation in August, 1893 was being opened to settlement, then that east one hundred foot strip was on the eastern boundary of the country "known as the Cherokee Outlet" and the Ponca Indian Reservation being east of that country "known as the Cherokee Outlet" was not within the prohibited district.

Again; this one hundred foot strip was within the outer boundaries; not an inner or sub-boundary, but within the outer boundaries of an "entire tract of country" that was being opened to settlement. Now, was the entire tract of country west of the 96th meridian being opened to settlement? If so, some bright homesteaders made an awful mistake on September 16, 1893, in not settling upon the magnificent bottoms along the Salt Fork, Red Rock and Bear Creek streams in the Ponca, Otoe and Missouri Reser-

vations and a like mistake was made in not settling upon lands of the Kaw and Osage Indians. If the Osage, Ponca, Otoe, Missouri and Kaw Reservations were not being opened to settlement on September 16, 1893, which of course they were not, then those Reservations constitute no part of the entire tract of country to be opened to settlement under this proclamation" of the President of August 19, 1893. For unless those Reservations were within the outer boundaries of an entire—not a separate, nor a divisible, but as the words say, "entire tract of country" that was then being opened to settlement on September 16, 1893, then they were not within the land which the President spoke of as "the country known as the Cherokee Outlet."

It is claimed by those who take the other side of the question from us that the latter portion of this part of the President's Proclamation, stating that said strip the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, states the place where this one hundred foot strip is, and puts that place, so far as the east line is concerned, upon the 96th meridian, which is the east line of the Osage Reservation. This construction cannot be maintained, never has been maintained or upheld by any judicial tribunal and never can be without violating the plainest canons of the construction of statutes. One of those rules of construction is that one section or part of a statute will not be so construed as to destroy another.

Mr. Justice Field, speaking for the Supreme Court of the United States in *Bernier* v. *Bernier* 147. U. S., 242, said:

"All Acts of the Legislature should be so constructed, if practicable, that one section will not defeat or destroy another, but explain and support it."

What becomes of the first portion of this provision of the President's Proclamation defining the one hundred foot strip if the construction of those persons who have been contesting legal homestead entries for the past nearly ten years is adopted? If the one hundred foot strip on the east line of the Cherokee Outlet is on the 96th meridian, how can it be "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement?" If that one hundred foot strip was on the east line of the Osage Indian Reservation, then it was not around and immediately within the outer boundaries of an entire tract of country which was being opened to settlement, because the Osage, Ponca and the other Indian Reservations, except the Tonkawa and Pawnee Reservations, were not being opened to settlement. The country that was being opened to settlement was an entire, a whole, a complete tract of country, because the President said it was an entire tract of country, that was being opened to settlement. That was the kind of a country the President was talking about when he spoke of the "country known as the Cherokee Outlet." Our construction permits both of these declarations in this

proclamation to stand and harmonizes, one with the other. The construction of the plaintiff permits only the last portion to stand and wipes out and obliterates the first.

This latter rule this Court has said in the case just cited is not the rule to be followed in construing statutes.

In the case of *Smith* v. *Townsend*, 148 U. S., 490, the opinion in which is prepared by Mr. Justice Brewer, the Court, speaking from its former decision, says:

"Courts in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reasons as well as the meaning of the particular provisions in it."

The Court in the same opinion says that one of the questions to be asked and answered in finding the true interpretation of statutes is:

"What was the mischief and defect for which the common law did not provide?"

All of these rules which we have and will refer to are of course equally applicable to a President's Proclamation, for it is a declaration which has the force and effect of a statute and should be considered in the same way.

What, then does the history of the time tell us was the defect in existing legislation which caused the President to provide for this one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement" on September 16, 1893? It was that on the northern, the southern, the

western and the eastern sides of this "entire tract of country" there was land in the possession and under the control of other peoples and tribes of people than those who were about to enter the coveted country. The right of possession of the farms on the north, the south and the west of this country being opened to settlement, was in individuals who had an ownership therein and the exclusive right of possession thereof. On the eastern side there were Indian Reservations to cross which it was in no wise unlawful, but to remain in which was not permitted except by order of the executive department. The President of the United States saw that unless provision was made whereby the intending settlers could locate immediately upon the border of the land that was being opened to settlement, a large price would probably be charged for the right to remain for some period of time immediately before the opening upon adjacent land. And the desire of the President being one that was to benefit the intending homestead settler and to make his path as easy as possible and surround with as little difficulty as was consistent with a strict enforcement of the policy of Congress and of the administration and give every man an equal show to enter this coveted country from any and all sides, bounds and corners, declared that there shall be a one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement."

In view of this purpose of the President and

in the light of the history of the time, it would be absurd to say that the President was promoting this purpose and desire by placing the one hundred foot strip on the east line of a tract of country from twelve to fifty miles from the tract of country to be opened to settlement. If this one hundred foot strip was on the 96th meridian, then it was twelve miles east of the land to be opened to settlement on the south end of that line, and fifty miles from the same land at the north end of it. And the settler standing on that one hundred foot strip at 12 o'clock noon, September 16, 1893, would have been twelve to fifty miles, and some places more on account of the bend in the Arkansas river and on account of the Ponca and the Otoe Reservations extending west of the river, to run in order to get upon the outer boundary "of the entire tract of country" that was then being opened to settlement. Such a construction makes the declaration of the President absurd, and it is a canon of construction that statutes and constitutions, will be so construed as to avoid absurd conclusions.

In the case of *LAW OW-BEW* v. *U.S.*, 144 U. S., 47-59, Mr. Chief Justice Fuller, speaking for the Court, said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or absurd conclusion."

In the case of *Bernier* v. *Bernier*, *supra*, the rule was also declared.

"When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the Act."

So if it were conceded that there is an ambiguity in the two portions of the declaration of the President referred to in this Proclamation, a thing we do not believe to be true, yet we say if so, then they must be construed by reading the two proviiions together and so that an absurd conclusion will not be reached by the construction and that construction adopted which will best promote the purpose of the Act. The purposes of the act being to permit intending settlers to locate themselves "around and immediately within the outer bonndaries of the entire tract of country to be opened to settlement" so that no person, tribe, or officer could say to such intending settlers, "You are now trespassing upon my land; you must vacate this land or pay my price for the use and occupancy thereof." Would the purpose of the President to avoid any such situation have been promoted by placing the one hundred foot strip on the east line of the Osage Reservation? That Reservation was not bing opened to settlement. That Reservation belonged then and now to an Indian tribe; to a people who owned their lands in common, and they had no interest in the settlement of the homesteader on the Cherokee Outlet. Why should the President say that they must give up

the possession of a part of that Reservation for a period from August 19, 1893, to September 16, 1893, in favor of the homestead settlers? The settlers had the right to go on the one hundred foot strip, wherever it was located, immediately after the President's Proclamation and to remain thereon until September 16, 1893. To locate that one hundred foot strip on the Osage Reservation means to take away some right of those Indians. To locate that strip where we claim the President located it took away no right of any Indians. To locate that strip where the opposition claim it is located, placed it at a point where no one of the many thousands of settlers whom the President supposed would desire to use it, would occupy it unless he be a fool. To place it where we say the President located it placed it where hundreds, aye, thousands of intending settlers would probably occupy it and the pathway to a homestead was made easier by its provisions. Furthermore, to place the one hundred foot strip on the east line of the Osage Reservation, placed it where the President, by the Act of March 3, 1893, was given by Congress no authority to place that strip, because that Act does not authorize him to regulate the opening of the Cherokee Outlet by placing the settlers in an occupancy of the lands of other people. The Osage people own their lands and while the President has no authority and guardianship over the Indians, he has no authority to take away the occupancy of those Indians of any of their lands without compensation. Why,

then, would the President, intending to benefit the settlers and to injure no one, take a hundred foot strip sixty miles long from the Osage Indians for twenty-eight days when it would prove a man an idiot to occupy the strip, provided at 12 o'clock noon, September 16, 1893, he desired to get a homestead on that day in the Cherokee Outlet.

Counsel for Plaintiff in Error in his brief below makes a point in the fact that the President in his Proclamation described all the lands west of the ninety-sixth meridian by metes and bounds and then proceeded to reserve the lands of the Osage, Kaw or Kansas, Otoe and Missouria and Ponca Indians from homestead settlement and thus seeks to support the argument that these lands were a part of "the entire tract of country to be opened to settlement," bnt were not opened because reserved from settlement in the Proclamation.

Let us answer this first by asking the question, whether these lands of these Indians so reserved from settlement by the President's Proclamation would have been opened to settlement on September 16, 1893, if the President had not declared the Reservation in the Proclamation? And if they would so have been opened to settlement if not reserved by the Proclamation, please answer under what authority or what Act of Congress they would have been opened to settlement?

In advance of the answer we put ourselves on record as saying that these lands would

not only not have been opened to settlement if the President had not reserved them from settlement in the Proclamation, but would not have been opened to settlement if the President had declared them open, because the President, like the people making entries of homesteads in the Cherokee Outlet on September 16, 1893, was a creature of the law, and that law gave him no authority or power to open these Indian lands to settlement. And whether he had reserved them from settlement or declared them subject to settlement, they would not have been open to entry, because it was not those lands that Congress had provided for being opened. But the President did not declare that these Indian Reservation lands were reserved from the Cherokee Outlet, but he did "declare and make known that all the lands acquired from the Cherokee Nation of Indians, the Tonkawa Tribe of Indians and the Pawnee Tribe of Indians by the three several agreements aforesaid will, at the hour of 12 o'clock noon," etc., be opened to settlement, save and except certain lands, etc. In other words the President was beginning with a tract that had been referred to as "Cherokee Outlet," a part of which had come to be "known as the Cherokee Outlet" and part of which had been acquired by treaty with the Tonkawa Tribe of Indians and by treaty with the Pawnee Tribe of Indians, and part of which had been ceded and conveyed to the Otoe and other tribes of Indians; and he was declaring that this tract of country, not called by him the "Cherokee Outlet," but

called by him "lands acquired from the Cherokee Nation of Indians, the Tonakawa Tribe of Indians and the Pawnee Tribe of Indians," and some of which belonged to some other Indians, and he was opening such portions of this tract, excepting those that he stated to the American people were not open. That is all there is to the argument that the Reservation, by the terms of the Proclamation, of these Indian lands from settlement, has to do with ascertaining where the one hundred foot strip is located around and within the outer boundaries of the entire tract of country to be opened to settlement, said tract being "the country known as the Cherokee Outlet."

Furthermore, Congress in referring to the lands which it was purchasing under the treaty with the Cherokee Indians, as the "Cherokee Outlet," did not thereby mean to be understood that it was purchasing from the Cherokee Indians all of these lands west of the 96th meridian, or that all of said lands were the lands called the "Cherokee Outlet" The ratification of the treaty with the Cheroeke Indians is contained in section 10 of this Act of March 3d, 1893. Section 11 of the same Act ratifies the treaty made for the purchase of the lands of the Tonkawa Indians, which lands comprised a part of these lands west of the 96th meridian, and section 12 ratifies the treaty for the purchase of the Pawnee lands, also a part of these lands west of the 96th meridian.

Congress certainly did not mean by this Act

that it was making a purchase of a part of these lands from three separate and distinct tribes of Indians. The fair construction of it is that it was purchasing the "Cherokee Outlet" as distinct from the lands of the other Indians, from the Cherokee Indians, and that it was purchasing also the lands of the Tonkawa and Pawnee tribes of Indians.

Congress did not mean to be understood as providing for the opening of all the lands of the old Cherokee Outlet in enacting the provisions of the Act of March 3, 1893, but it did mean that the Government, by the Act in ratifying the treaties with the Cherokee, Tonkawa and Pawnee Indians, was acquiring the absolute release from the Cherokee Nation of Indians of all of the lands claimed by said Cherokee Indians west of the 96th meridian and commonly known and called "Cherokee Outlet" and defined by executive order of August 10, 1869, but Congress did not mean that on March 3, 1893, those lands were "the country known as the Cherokee Outlet," for that was not true, for the Cherokee Outlet had been greatly diminished by the issuance of patents to the Osage Indians and the granting of title, qualified or absolute, to other tribes of Indians. This title of a part of this Old Cherokee Outlet, in Other Indians, is recognized in this very Act, for by it the title of the Tonkawa and Pawnee tribes of Indians was acquired by the Government.

The Cherokee Nation of Indians granted no more by the cession of its rights in and to the

lands covered by the Osage, Kaw, Ponca and other tribes of Indians than if it had been granted only its right and title to the lands of the Cherokee Outlet as it was known and commonly called on September 16, 1893, for the rights of the Cherokees had already been extinguished by treaty allowing friendly Indians to be located upon the old Cherokee Outlet. And with the exception that a mere precaution was being exercised in the full and repeated extinguishment of the Cherokee claim to the lands in the eastern portion of the old Cherokee Outlet, then occupied and belonging to other tribes of Indians, Congress, in Section 10 of the Act of March 3, 1893, was dealing with the land which was opened to settlement on September 16, 1893, excepting the seventy and one allotments taken out thereof. In the Act of March 3, 1893, it is said (*U. S. Stat. at Large*, Vol. 27, p. 642):

"And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of two hundred and ninety-five thousand, seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain."

Now, this language was used by Congress in referring to the land which Congress understood it was acquiring by the grant contained and provided for in the treaty with the Cherokee Indians which Congress was then approving. Congress then could not have considered the lands of that part of the old Cherokee Out-

let, which it had by regulation and treaty given and conveyed to the Osage, Ponca and other Indians, as being an integral part of the land which it was acquiring from the Cherokee Indians, for the words "and said lands" means of course all of said lands, and Congress was providing that those lands, "excepting the portion to be alloted as provided in said agreement," should, upon payment of the price to the Cherokee Indians, "become and be taken to be and treated as a part of the public domain." Was the Osage Reservation and the Ponca Reservation to become and be taken to be a part of the public domain? Certainly not. The entire Act evinces no such intention and the Government had by treaty long before vested in the Osage Indians a complete title as an Indian Tribe to the lands of its Reservation. So that the phrase "and said lands" means the lands of the Cherokee Outlet as the country was known after the passage of the Organic Act of Oklahoma, and those lands, excepting the lands to be allotted, were to become a part of the public domain when the Cherokee Indians were paid the sum of $295,736.

The same Section 10 of the same Congressional Enactment referred to the allotments which were provided for in the fifth section of the Cherokee agreement and those were the seventy Cherokee allotments and one allotment to D. W. Bushyhead also provided for. So that when Congress enacted that said lands, excepting the portions to be allotted as provided in said

agreement, it meant the lands, or at least the President understood in the Proclamation that it meant the lands "of the country known as the Cherokee Outlet," and it meant that said lands, excepting the seventy-one allotments provided for, were to become a part of the public domain when the Cherokee Indians were paid the price stipulated, and that land could not have included the lands of the old Cherokee Outlet that had been granted to the old tribes of Indians, because those lands could not become or be treated as part of the public domain and were therefore no part of the Cherokee Outlet that the President's Proclamation referred to.

Since the approval of the Organic Act of Oklahoma on May 2, 1890, the Cherokee Outlet has been only that part of the old Cherokee Outlet which was not made a part of the Territory of Oklahoma. In Section 1 of the Organic Act, Congress bounded Oklahoma Territory as follows:

"Commencing at a point where the 98th meridian crosses the Red river, thence by said meridian to the point where it crosses the Canadian river; thence along said river to the west side of the Seminole country, thence along said line to the north fork of the Canadian river, thence down said river to the west line of the Creek country, thence along said line to the northwest corner of the Creek country, thence along the north line of the Creek country to the ninety-sixth meridian, thence northward by said meridian to the southern boundary line of Kansas, thence west along said lands to the Arkan-

sas river, thence down said river to the north line of the land occupied by the Ponca tribe of Indians, from which point the line runs so as to include all the lands occupied by the Ponca, Tonkawa, Otoe and Missouri and Pawnee tribes of Indians until it strikes the south line of the Cherokee Outlet, which it follows westward to the east line of the State of Texas thence by the boundary line of the State of Texas to the point of beginning; the Public Land Strip which is included in said Territory of Oklahoma, is bounded east by the one hundredth meridian, south by Texas, west by New Mexico, north by Colorado and Kansas."

Congress then in the same Section said:

"Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the President shall make Proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the Territory of Oklahoma."

From this legislation it appears clearly that Congress has defined "the land known as the Cherokee Outlet" and that land is the remaining portion of the old "Cherokee Outlet', as before known and as quoted when referring to executive orders. The eastern portion of the old Cherokee Outlet was, after the passage of the Organic Act not a part of the Cherokee Outlet, but was a part and parcel of the Oklahoma Territory, expressly so declared by the Organic Act defining the boundaries of Oklahoma.

The Cherokee Outlet, as it formerly existed, was a part of the Indian Territory, and the part of the Indian Territory that was formed into

the Territory of Oklahoma was taken out of the Indian Territory and made the Territory of Oklahoma. Then Congress provided that whenever the interest of the Cherokee Indians in the land "known as the Cherokee Outlet" should be extinguished and the President should make Proclamation thereof, said Outlet should then, without further legislation, become a part of the Territory of Oklahoma, but that land which the plaintiff now claims was Cherokee Outlet on September 16, 1893, had already become a part of the Territory of Oklahoma, and if it had become a part, it certainly could not by Proclamation or otherwise thereafter become a part of the territory of which it was already a part. There was therefore a clear distinction between the lands which the plaintiff claims were a part of the Cherokee Outlet on September 16, 1893, and the "country known as the Cherokee Outlet."

The Supreme Court of the United States has, in our judgment, settled this question in the case of *U. S.* v. *Pridgeon*, 153. U. S., 48. The question there was whether, after the passage of the Organic Act of Oklahoma, Pridgeon could be prosecuted in Oklahoma Territory for larceny under the Act of February 15, 1888, prohibiting larceny in the Indian Territory. The Government claimed that the Cherokee Outlet was not a part of the Territory of Oklahoma but remained under the operation of the criminal laws provided by Congress for the Indian Territory and under the jurisdiction of those laws. The petitioner in this habeas corpus proceeding claimed that

after the passage of the Organic Act for Oklahoma the Cherokee Outlet was no longer under the jurisdiction of the Larceny Act provided for the Indian Territory The second proposition submitted by the Circuit Court of Appeals for the Sixth Circuit to the Supreme Court of the United States, was:

"Was the indictment against Pridgeon fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county,' with a description of territory which includes part of Oklahoma and part of the Cherokee Cutlet not in Oklahoma, and avers the same to be 'then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America?'"

The Supreme Court in this case decided the question of the relation of the Cherokee Outlet to Oklahoma Territory squarely. The syllabus reads as follows:

"On November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by Act of May 2, 1890, c. 182, 26 Sat. 81, horse stealing was not a crime against the United States, punishable under the Act of February 15, 1888, c. 10, 25 Stat. 33; but as to the Cherokee Outlet, it remained Indian country after the passage of the Act of May 2, 1890, and such an offense, committed there, continued to be an offense against the United States.

"An indictment in the District Court of the United States within and for Logan county in Oklahoma Territory, and for the Indian country

attached thereto, charging the commission of the offense of horse stealing in November, 1890, and laying the venue of the offense 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan county," with a description of territory which included part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and which averred the same to be 'then and there Indian country,' and a place 'then and there under the sole and exclusive jurisdiction of the United States of America,' will not be held to be fatally defective when attacked collaterally by writ of habeas corpus."

The relation of the Cherokee Outlet to Oklahoma Territory and to the other portions of the old Indian Territory which had been carved out of that Territory were clearly defined by the Supreme Court in its opinion. It is there said:

"It is contended by the appellee that inasmuch as the act of February 15, 1888, did not apply to the Territory of Oklahoma and inasmuch as section 11 of the act of May 2, 1890, did not adopt the criminal code of Nebraska as a law of the United States, so as to make horse stealing in the Territory an offense against the United, the district Court for the judicial district within and for Logan county, Oklahoma Territory, sitting as a court of the United States, had no jurisdiction over the offence charged against Pridgeon. This position, however, is not well taken. The boundaries of Oklahoma Territory, as defined by the act of May 2, 1890, creating a temporary government therefor did not include the Cherokee Outlet."

Here is a square declaration by the Supreme Court that the boundaries of Oklahoma, as defined by the Organic Act, "did not include the Cherokee Outlet." If that be true, then the Cherokee Outlet must be the country which we claim it to be and a part of the east line of that Cherokee Outlet must, on September 16, 1893, have been along the north and west lines of the Ponca Indian Reservations, so that our client was not in the "country known as the Cherokee Outlet" when he was in the Ponca Reservation. Otherwise this language just quoted from the Pridgeon case is not true, because if the Ponca Reservation was in the Cherokee Outlet then the boundaries of Oklahoma did include a part of the Cherokee Outlet.

Counsel for plaintiff may take certain isolated clauses in this Pridgeon case as a basis for argument that the Supreme Court in that case held that a part of the Cherokee Outlet was in Oklahoma Territory and a part not in Oklahoma Territory. But that argument is not sound and cannot dissipate the force of the decision of that Court that the boundaries of Oklahoma "did not include the Cherokee Outlet."

Where the Supreme Court in that decision spoke of "a part of the Cherokee Outlet not in Oklahoma" and "part was in the Cherokee Outlet not embraced within the boundaries of Oklahoma" and part as "outside of the boundaries of Oklahoma Territory" and "in that part of the Cherokee Outlet herein before referred to," and "that portion of the Cherokee Outlet not em-

braced within the boundaries of the Territory of Oklahoma" and "that portion of the Cherokee Outlet lying west of the Indian Meridian," and "in that portion of the Cherokee Outlet attached to Logan County for judicial purposes" these expressions were used as the last one quoted clearly shows, with reference to "that portion of the Cherokee Outlet attached to Logan county for judicial purposes." None of these expressions, when carefully read in connection with the rest of the sentence or sentences state or intended to mean that a part of the Cherokee Outlet was in Oklahoma and part of the Cherokee Outlet in the Indian Territory, but are descriptive of the situation, not as made by act of Congress, but to describe the portion of the Cherokee Outlet which, under the terms of the Organic Act, was by the Supreme Court attached for judicial purposes to Logan county, Oklahoma Territory. So that in no part of the decision is the direct positive holding that "the boundaries of Oklahoma Territory as defined by the Act of May 2, 1890, creating a temporary government therefor, did not include the Cherokee Outlet," in any way qualified or limited by this decision. And the decision clearly and succinctly states and declares that the Cherokee Outlet did not become a part of the Territory of Oklahoma but remained Indian country after the passage of the Organic Act of May 2, 1890, and under the operation of the Larceny Act passed for the Indian Territory on February 15, 1888, while in the Ponca, Otoe, Missouri, Ton-

kawa and Osage Reservations which were made a part of Oklahoma by the Organic Act, the Act of February 15, 1888, was withdrawn therefrom and this Larceny Act no longer operated therein.

With this decision as authority, there appears and is no escape from the conclusion that from and after the passage of the Organic Act for Oklahoma the land or country known as the Cherokee Outlet,, was intended to comprise that part of the old Outlet for the Cherokee Indians, which had not already been taken from the jurisdiction of such Outlet and embraced within the border of Oklahoma Territory.

DEPARTMENTAL CONSTRUCTION.

That this one hundred foot strip along the eastern border of the Cherokee Outlet was not located down the 96th meridian and along the eastern line of the Osage Reservation, has been the uniform holding of the Interior Department, that executive branch of the Government upon which Congress imposed the duty of enforcing the Act of March 3, 1893, and of carrying out its provisions for the opening of the Cherokee Outlet to settlement.

This construction having been placed upon this provision of the President's Proclamation now to be interpreted by this Court, even if the language is conceded to be open to construction, should have very great weight with this Court, and in case of doubt should be given controlling weight.

This proposition is supported by the decision of the Supreme Court of the United States through a period of nearly three-quarters of a century. In the early case of the *United States* v. *The State Bank of North Carolina*, 6 Pet. 29-40, the Court said:

"It is not unimportant to state that the construction we have given to the terms of the act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates of deceased persons, as well as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the case of *United States* v. *Moore*, 95 U. S., 760, the Court said:

"The construction given to a statute by those charged with the duty of executing it, is always entitled to most respectful considerations and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 id. 1. The officers concerned are usually able men and masters of the subject. Not unfrequently they are the craftsmen of the laws they are afterwards called upon to interpret."

In the case of *The United States.* v. *Johnson*, 124 U. S., 236, on page 253, the Court said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entititled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction be erroneous. *Edwards v. Darby*, 12 Wheat, 206, 210; *United States v. Moore*, 95 U. S. 760; *Hahn v. United States*, 107 U. S. 402; *United States* v. *Philbrick, 120 U. S.*, 120 U. S. 52, 59,"

In the case of *Pennoyer* v. *McConnaughy*, 140 U. S., 1, the Court used this language (page 23:)

"The principle that the contemporaneous construction of statutes by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to prove it. On the faith of a construction thus adopted, rights of property grow up which ought not be ruthlessly set aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

And in the late case of *United States* v. *Alabama, Etc., Ry. Co.*, 142 U. S., 615-621, the Court held:

"We think the contemporaneous construcnion thus given by the executive department of the government, and continued for nine years

through six different administrations of that department—a construction which, though inconsistent with the realism of the act, certainly consorts with the equities of the case--should be considered as decisive in this suit. It is a settled doctrine or this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

Now, as before stated, the Department of the Interior, beginning with Secretary Hoke Smith, who was Secretary of the Interior at the time the rules and regulations for opening the Cherokee Strip were prepared by the Interior Department and were approved and incorporated into the President's Proclamation, and followed by his successors to the present time, has uniformly held that the one hundred foot strip on the east line of the Cherokee Outlet was west of the Osage Nation, and Ponca and Otoe Reservations.

A peculiar force and effect thus attaches to the contemporaneous construction placed upon this clause of the Proclamation. It is therefore important to consider the interpretation placed upon this clause by the department charged with the duty of primarily construing and enforcing the provisions of the Proclamation.

Shortly following the opening the local land

office in the case of *Cagle* v. *Mendenhall*, held in effect that Cagle was, under the terms of the Proclamation, entitled to make the race on the day of the opening from the eastern boundary of Outlet, being the western boundary of the Otoe Indian Reservation. On appeal from that holding the question was presented to the General Land Office. Probably the soundest and ablest decision or brief that has ever been written on this question is the opinion of the Honorable Commissioner of the General Land Office in that case, Because of the ability of that decision and of its being the first formal departmental construction of the Proclamation, made by the same officer who prepared it for the President's signature, we set the same forth in full :

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

Washington, Feb. 5, 1895.

BYRON E. CAGLE	Involving H. E. No. 5777, made March 15, 1894. for N. W. ¼, Sec. 22, Tp. 23 N., R. 1 W., I. M.
vs.	
W. J. MENDENHALL.	

REGISTER AND RECEIVER,

PERRY, OKLA.

GENTLEMEN:

September 19, 1893, L. Haskins made homestead entry No. 457, for the N. W. ¼ Sec. 22, Tp. 23 N., R. 1 W., I. M.

You report that on Oct., 14, 1893, W. J. Mendenhall, the defendant herein, filed affidavit of contest against Haskins' entry, alleging prior settlement. I do not find said affidavit among the papers of the case

Nov. 16, 1893, Byron E. Cagle filed affidavit of contest against Haskin's entry, alleging, "that the said tract is not settled upon and cultivated by said party as required by law; that the said party did not make his said entry until after he had settled upon said land; that he, the said Cagle, was the first settler upon said land; that his settlement was made in the afternoon of Sep. 16, 1893; that he has built a house on the land and has actually resided thereon with

his family from Sep. 16, 1893, to the present time."

February 5, 1894, Cagle filed an amended affidavit, alleging that he had settled upon said tract before Haskins had made his entry for said tract of land; that his settlement was prior to that of Haskins, Mendenhall and all others, etc.

March 15, 1894, Haskins filed a relinquishment and Mendenhall made H. E. No. 5777.

Hearing was had between Cagle and Mendenhall Dec. 4, 1894. Both parties appeared with their attorneys and witnesses and submitted testimony.

Dec. 6, 1894, you rendered joint decision recommending that defendant's entry be canceled, and the prior right of entry according to Cagle.

From this decision defendant, on Dec. 27, 1894, appealed to this office and assigned error, the material specifications of which are as follows:

First.

The Register and Receiver erred in finding and holding that contestant, Byron E. Cagle, made settlement on the land in dispute prior to the settlement thereon by defendant; W. G. Mendenhall.

Second.

Erred in finding from the evidence that Byron E. Cagle has resided upon and improved the land in dispute in compliance with the homestead law of the United States.

Third.

Erred in finding that Byron E. Cagle is qualified to make homestead entry of land in the Cherokee Outlet.

There is little, if any, conflict as to the facts in the case. It clearly appears that Cagle was the first settler upon the tract, and that his residence thereon has been continous from the time he made settlement, on the afternoon of Sep. 16, 1893 to the time of hearing. Defendant settled upon the land the afternoon of Sep.16 1893, some time after plaintiff began his settlement, and has substantially complied with the law as to residence since that time.

Defendant's third assignment of error presents a question more difficnlt of determination. 1t is admitted by plaintiff that he started in the run for the land from a point within a hundred feet from the west line of the Otoe and Missouri Reservation, and that he had been upon the one hundred foot strip bordering on the Otoe and Missouri Reservation and immediately within the territory opened to settlement, prior to noon Sep. 16, 1893.

Was Cagle disqualified from acquiring title to lands opened to settlement by the President's Proclamation of Aug. 19, 1893, by virtue of his having entered upon the land opened to settlement, in the manner hereinbefore stated?

It was provided by act of March 3, 1893, (27 Stat., 640) that the land purchased from the Cherokee Indians, by an agreement concluded between David H. Jerome, Alfred M. Wilson and Warren T. Sayer, duly appointed commissioners on the part of the United States; and Elias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett and Joseph Smallwood, duly appointed commissioners on the part of the Cherokee Nation of Indians, should be opened to settlement within six months from the date of said act, by the Proclamation of the President.

There were excepted from entry by said act the lands used in connection with the Chilocco Indian Schools, certain allotments, and sections 16 and 32 in each township reserved for the benefit of the public schools.

It was further provided in said act "that no person shall be permitted to occupy, or enter upon lands herein referred to, except in the manner prescribed in the Proclamation of the President opening said lands to settlement, and any person otherwise occupying and entering upon said land shall forfeit all right of acquiring such land."

The President's Proclamation, dated Aug. 19, 1893, prescribed that

"A strip of land one hundred feet in width, around and within the outer boundaries of the entire tract of country to be opened to settlement under the proclamation is hereby temporarily set apart for the following purposes and uses, viz:

Said Strip, the inner boundaries of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of the said country by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass or in violation of the proclamation or of the law under which it is made; nor shall any settlement rights be acquired thereby."

While there is no argument accompanying the appeal of defendant, I glean from the preliminary motions and from a statement in the defendant's fourth assignment of error, that his contention as to the disqualification of plaintiff

Cagle is based upon the fact that Cagle entered upon the strip one hundred feet in width, immediately west of the Otoe and Missouri Reservation.

I do not think, that in view of the unequivocal language of the statute empowering the President to provide such rules and regulations for the opening of said lands to settlement as he saw proper, it could be contended that the President was without authority to temporarily set aside this strip as a starting point for the intending settlers, and that if the President did so set apart the strip, Cagle did not violate the law in entering upon the same prior to noon, Sep. 16, 1893.

The first part of the order setting aside this strip clearly gives homeseekers the right to enter upon the strip west of the Otoe and Missouri Reservation, inasmuch as it provides that a strip "one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," etc., shall be set apart.

There is, however, an apparent conflict upon the face of the order designating the location of this strip, in that the order further prescribed that "Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country," etc.

This "strip temporarily set apart" was never surveyed or marked out by any authority and each intending settler was left to ascertain the location thereof.

What is the country known as the Cherokee Outlet, to which the President made reference?

It was provided in a treaty between the United States and the Cherokee Nation of Indians, concluded in 1828, (7 Stat., 3111) that the Government of the United States should possess the Cherokee Nation of Indians, and "guarantee it to them forever," seven million acres of land, the eastern boundary of which was given and the northern and southern boundaries fixed in part by the Arkansas and Canadian Rivers, it being provided that said territory should extend far enough west so as to make seven million acres of land, and,

"In addition to the seven million of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all of the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of dominion extend."

According to this treaty a large portion of the lands ceded to the Creek Indians was included in the cession to the Cherokees, and by a treaty concluded between the United States and the Cherokees in 1833, (7 Stat. 414) the boundaries of the seven million acre tract ceded to the Cherokees was changed, but the same number of acres was granted to them, and the same provision as to an outlet west was incorporated in said treaty. By another treaty concluded between the same parties in 1835, (7 Stat., 578) the government of the United States agreed to issue patent to the Cherokees for the home tract and for the outlet lands, as well as for a strip of land purchased from the United States by the Cherokees.

By a treaty concluded between this Government and the Cherokee nation in 1866, (14 Stat.,

799) it was provided that the United States might settle civilized Indians friendly to the Cherokees, on the lands of the Cherokees.

A different regulation was made as to settling those Indians east and west of 96°, and from this provision possibly arose the erroneous impression that 96° was the dividing line between the home and outlet tracts of the Cherokees.

In this connection, the following quotation from a letter from Hon. T. J. Morgan, Indian Commissioner, to Secretary Noble, is not amiss:

"It may be remarked here that the western boundary of the 7,000,000 acres has never been ascertained, and no man knows to this day where the 'home' ceases and the 'outlet' begins. Certain it is that a portion of the lands west of 96° commonly regarded as constituting the outlet, are a part of the home, for the Cherokee Country without any of these lands comprises but 5,031,-351 acres." (See Senate Ex. Doc., No. 56, 52d Con., 1st Ses.)

It was provided by the act of March 2, 1889, (25 Stat., 105) that the President was authorized to appoint three commissioners to treat with the Cherokees and other nations of Indians owning and claiming lands lying west of the ninety-sixth degree of longitude, and that the Commission was authorized to submit to the Cherokee Nation the proposition that said nation should cede to the United States all their rights in said lands, and if the Cherokees should accept said offer, the said lands should become a part of the public domain.

The act of May 2, 1890, providing a government for Oklahoma, prescribed that "whenever the interest of the Cherokees in the land known as the *Cherokee Outlet* shall have been ex-

tinguished and the President shall make proclamation thereof, said outlet shall without further legislation become a part of the Territory of Oklahoma." (26 Stat., 82). In prescribing the boundaries of Oklahoma, in the act referred to, *supra*, the Ponca, Tonkawa, Otoe and Missouria Reservations are included therein, and the "Cherokee Outlet" is given as one of the boundaries. (See also case of *U. S.* v. *Pridgeon*, 153 U. S. Reports, 48.)

Jan. 9, 1892, the Commissioners reported that they had effected an agreement with the Cherokees, but that they had not been able to secure the lands upon the terms authorized by the act of March 2, 1889. In their report the Commissioner says:

"The lands embraced within the description, include the Osage and Kansas reservation, the Tonkawa, Ponca, Pawnee, and Otoe reservations, and the *Cherokee Outlet*, and contains 8,144,632.91. acres * * * The reservations above mentioned have been included in this agreement because the Cherokees have claimed a contingent interest therein. * * * The amount of money the Commission has agreed to pay is $1,106,017.34, more than advised in said original letter of instructions.

If the amount agreed to be paid is applied to the 6,022,754.11, then the price per acre is $1.43.

If the amount, however, is applied to all the lands west of the Arkansas River, 6,547,486.55 acres, then the price per acre is a fraction less than $1.31.

Again, if the price agreed to be paid is applied to all the lands embraced within the boundaries of the lands ceded, 8,144,682.91 acres, then the price per acre is $1.05."

Although the treaty of 1866 provided that when the land of the Cherokees was sold by them to other Indians the title of the Cherokees "should terminate forever as to the lands sold," yet it seems that they claimed an equity in the lands and refused to cede the unoccupied lands unless they were given a certain amount for the lands occupied by other Indian tribes west of 96°.

According to the report of the Commission, the Cherokees refused to sell the lands which Congress had authorized the Commissioners to purchase, unless they were given a certain amount, and this amount the Commissioners, on the part of the United States, agreed to give, and in order to settle any questions that might arise in the future, the treaty provided for a cession of all lands in which the Cherokees had any right or interest west of 96°. Hence it was necessary that the Congress should ratify the treaty, before it became operative.

I have before me a map of the United States and Territories, issued in 1892, under the direction of Hon. T. H. Carter, former Commissioner of this office, on which there appears, as a part of the Indian Territory, and Oklahoma Territory, the Cherokee Nation, the Osage Reservation, the Ponca, Pawnee, Tonkawa, Otoe and Missouria Reservations, and the *Cherokee Outlet.* I have also an atlas of the world, prepared by Mast, Crowell & Co., on page 52 of which the map of the Indian Territory is given. Here also appears the subdivision noted *supra.* In both of these maps the Cherokee Outlet is substantially identical with the territory opened to settlement by the President's Proclamation of Aug. 19, 1893.

There can be no doubt that these reservations were not regarded by the Congress as a

part of the "Cherokee Outlet," as understood by the reference thereto wherein it is prescribed "Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extiguished, and the president shall make proclamation thereof, the said *Outlet* shall thereupon and without legislation become a part of Oklahoma." It is also manifest that the Congress did not regard these reservations as a part of the land owned by the Cherokees, west of 96° of longitude, referred to in the appointment of the Commission, March 2, 1889, for it was prescribed by said act that whenever the title of the *Cherokees* was extinguished said land, should, upon the proclamation of the President, become a part of the public domain, for if such reservations were a part of the land owned by these Indians, then, under the terms of said act they would become subject to settlement, in violation of the solemn treaty obligations. These Indians, for the most part, if not all of them, not only bought these lands from the Cherokees, but exchanged with the United States Government other lands therefor. In the report of the Cherokee Commission these reservations are referred to by name and, together with the "Cherokee Outlet," form the territory which the Cherokees granted to the United States by said treaty.

The letter of Hon. T. J. Morgan, formerly Indian Commissioner, from which I have quoted *supra*, shows that the Cherokee home tract, extending to 96° west longitude, contains only 5,031,351 acres; that according to the estimate made in 1835, by Hon. Lewis Cass, then Secretary of War, the entire country granted to the Cherokees consisted of about 13,800,000 acres, of which seven million acres was included in the

home tract, six million in the "outlet" and 800,000 purchased from the United States by the Cherokees.

The report of the Cherokee Commission shows that there was included in the grant from the Cherokees 8,144,682 acres of land, of which 2,121,928 acres were embraced in the Indian Reservations; showing that the entire Osage Reservation and almost the entire Ponca, Pawnee and Otoe Rerservations, were at no time a part of the Cherokee Outlet, but were carved out of the Cherokee home tract, and that if the line between the home tract and the outlet lands had been established, it would have been almost identical with the western line of the Ponca and Otoe Indian Reservations.

I have given this extended review of these treaties to show that little, if any, of the lands owned and occupied by the Indians in the country between the lands now held by the Cherokee Nation and the land opened to settlement by the President's proclamation of Aug. 19, 1893, was ever a part of the Cherokee outlet proper.

I have cited the different acts of Congress bearing on this subject, to show that the Commissioners, as provided by Congress, were authorized to purchase the unoccupied portion of the Cherokee lands west of 96° west longitude, it being the position of the United States that according to the plain provisions of the treaty of 1866, the Cherokees had parted title with all lands bought from them by the Indians who settled upon their lands west of 96°, and that when the treaty between the Commission, on the part of the United States, and the Commissioners acting for the Cherokee Nation was alluded to, and the sufficient amount of money appropriated to pay for the cession of said lands to the United

States by the Congress (27 Stat., 640), that the reference to the "Cherokee Outlet" applied only to the unoccupied lands purchased from the Cherokees. This conclusion is further borne out by the fact that, while the Congress provided for the reservation of the Chilocco School lands, the public school sections and the allotments made by said treaty, no specific reservation of these lands was made. It is manifest that the Congress would have reserved these Indian Reservation lands from settlement, if they had been deemed a part of the country opened to settlement, known as the "Cherokee Outlet."

For the foregoing reasons, I am convinced that when the President prescribed that a strip of land one hundred feet in width should be set aside around and immediately within the country to be opened to settlement, that by the "Cherokee Outlet," and the "entire country to be opened," identically the same territory was meant.

Admitting, however, that the country known as the "Cherokee Outlet," and the country opened to settlement were not identical, a simple rule of statutory construction would locate the strip "around and immediately within" the country opened to settlement, for in that case, the proclamation contains two provisions repugnant to each other. The provision easily understood, simple of application and evidently expressing the purposes for which the legislation was intended, is always taken, as opposed to a provision that is confusing, impracticable and subversive of the purposes for which the legislation was enacted.

The purposes for which this strip was set apart were expressed in the order, i. e., "to al-

low intending settlers to enter the same before the hour of noon, Sept. 18, 1893." The object in opening this strip was obviously to protect people owning lands bounding on this country from trespass, and at the same time provide all homeseekers with a common starting place. It would be absurd to provide a starting place sixty or seventy miles from the nearest lands opened to settlement. To reach the land opened to settlement immediately west of the Tonkawa Indian Reservation, a settler starting from 96° west longitude and traveling in a due west course would have to pass over private property a distance twice as great as the widest part of the land opened to settlement. Locating this strip east and upon the Osage Reservation, as would be done if the construction be given the proclamation, that the strip should extend around the entire country ceded to the United States by the Cherokees, would not only render the strip of no practical use, but would be a violation of the treaty obligations with these Indians, as it would set apart a portion of their territory for temporary public use, without their assent, and subject their lands to trespass by those who ran from said strip to the lands opened to settlement.

For these, if for no other reasons, the plain intendment of the proclamation would place the strip temporarily set aside "around and immediately within the lands opened to settlement."

There was introduced in evidence, and filed as an exhibit in said case by defendant, W. J. Mendenhall, the following telegram:

Washington, D. C., Aug. 30, 189

W. J. MENDENHALL,

Settlers will not be permitted to enter the strip from any Indian Reservation, nor

will settlers be permitted to cross the strip before the hour of opening. Booths will be arranged on the Kansas side of and also on the Oklahoma side of the strip.

JOHN R. REYNOLDS,
Acting Sec'y.

There is nothing repugnant to the conclusion hereinbefore reached, expressed in this telegram.

Settlers are not prohibited thereby from assembling on the one hundred foot strip "around and immediately within the country to be opened to settlement," bordering on these reservations. It was doubtless the purpose of the Hon. Acting Secretary, at least his words imply as much, to notify parties that they would not be allowed to trespass upon these Indian Lands. If the Hon. Secretary had held differently, inasmuch as by the act opening these lands to settlement, and in the President's Proclamation there was no prohibition as to occupancy except as to the lands opened to settlement, these Indian lands would likely have become a rendevous for those desiring to enter the territory from the east.

Admitting, however, that the telegram of the Hon. Acting Secretary could be construed to mean that settlers would not be allowed to assemble upon this "one hundred foot strip" west of these reservations, it will be observed that the Hon. Acting Secretary did not prescribe by said telegram any penalty for entering in controvention thereto, nor indicate the consequences of such entry.

Finally, the act opening said lands to settlement, provides "that the Secretary of the Interior shall, under the directions of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement

of said lands, to be incorporated in the Proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

The Hon. Secretary of the Interior did prescribe such rules under the direction of the President, and they were incorporated in said proclamation, and it cannot be presumed that in a telegram to a private individual, without any notice to other homeseekers, the Hon. Secretary would attempt to abrogate a plain provision of the President's Proclamation, by disqualifying those who had assembled upon this strip, in conformity with the President's Proclamation.

You did not err in holding that Cagle was not disqualified from acquiring land opened to settlement by the President's Proclamation of Aug. 19, 1893.

Your decision is affirmed, and Mendenhall's entry is held for cancellation, subject to the exercise by Cagle of his preference right within thirty days from notice that this decision has become final.

Notify the parties. Advise defendant of his right of appeal.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Such is the view the department originally took of the proclamation. This construction has been uniformly followed. No decision has ever held the hundred foot strip to be located on the 96th meridian, or elsewhere than on the immediate boundary of the lands opened to settlement. The "country known as the Cherokee Outlet" has been held to be identical with the "entire tract of country to be opened to settlement." For nine years and a half the department has consistently administered the law as thus construed. Hundreds of patents have been issued (outside of the contested cases) to men who ran from these reservations. In the eastern portion of the Outlet titles now rest in a very large measure upon the law as thus settled by the department, which had charge of the primary enforcement and construction of this provision of law. The record clearly shows that the district and the supreme court of the territory have followed closely the same construction. It has thus grown into a rule of property of nearly ten years standing. Under the circumstances a reversal of this construction at this late day would be almost a calamity. Not only the titles of thousands of acres of these lands are involved. Many of the people from the reservations settled upon town lots, and their titles would likewise be placed in jeopardy. The community would be plunged into a sea of litigation.

When the plaintiff asks this court to overturn such a well settled rule of construction, he assumes the burden of showing "that the con-

struction itself is manifestly incorrect." This can only be accomplished by showing that the term "Cherokee Outlet" was incapable of the construction the department has placed upon it. To show that this term was incapable of that construction it must be made to appear that it had formerly acquired a well defined, well settled meaning which was entirely repugnant to that applied to it in the department.

It therefore is highly important to look closely into the origin, history and application of the term "Cherokee Outlet."

This, fortunately, the Commissioner has done for us in the decision last quoted. It is there clearly shown that the eastern boundary of the "Outlet" was never fixed or definitely determined. The line where the 7,000,000 acres of the "home" tract ceased and the "Outlet" began was never located. It was from first to last entirely undefined. Then it appears that the precise boundary that is in dispute here has from the first been at all times unsettled and undetermined.

After being then created with this indefinite eastern boundary other elements of uncertainty were added. First, the Osage reservation was carved out of these Cherokee lands, then followed from time to time other minor reservations. While these lands were purchased outright at a price fixed by treaty and under a provision that the title of the Cherokees "should terminate forever as to the lands sold," yet, the Cherokees still consider them as their "Outlet,"

while the rest of the world treated their title as extinct. Consequently we find the phrase "Cherokee Outlet" sometime used to designate such portions as were yet unsold, and at other times to designate those reservations as well.

When the Territory of Oklahoma was created the reservation thus carved out of the Cherokee lands was expressly made a part of the new territory, while the unoccupied portion lying west of them was designated as the "Cherokee Outlet," and provisions made for attaching it to the territory whenever it should be opened to settlement. Thus matters became more and more complicated, and the phrase "country known as the Cherokee Outlet," or "commonly known as the Cherokee Outlet," were coined and used in contradistinction to the original "Outlet." On every hand we find elements of uncertainty surrounding that term. It is, therefore, manifestly impossible for plaintiff to show any clear, defined, well-settled and exclusive application of this term to one specific tract. It was used quite indiscriminately to refer to all or various parts of these lands as might suit the immediate purpose in hand.

Certainly there was no established, exclusive meaning that was repugnant to view which the Department adopted.

Plaintiff has in no wise shown that the department's "construction is manifestly incorrect." As we have seen, that construction is supported by the direct precedent found in the organic act, also by the report of the Cherokee

Commission who made the treaty of purchase, it is borne out by the official maps of the United States in existence at the date of the proclamation, and has received the stamp of approval of this court in the case of *U. S.* v. *Pridgeon.* Moreover, it is the only construction not repugnant to the prior clause defining the same strip. It alone gives full effect to the purposes for which that strip was created. The opposite construction is untenable, repugnant and leads to many absurdities.

Under such circumstances it is clear that the construction reached by the Interior Department is the correct and sensible one. That nothing is now shown as a reason for overturning that construction after it has become an important rule of property in Oklahoma Territory.

Secretary Hoke Smith did, it is true, reverse the *Cagle* v. *Mendenhall* decision which we have quoted. That opinion is found in 20 L. D. 446. We call the courts attention, however, to the fact that this opinion was shortly thereafter overruled and expressly reversed, and that it was not the rule of construction adopted by the department but an exception, ~~but~~ in conflict with the line of decisions both before and after it was rendered.

Even this now famous case does not sustain the plaintiff's construction. Instead of supporting the theory that the 100 foot strip was on the 96th meridian or the eastern boundary of the Outlet as distinguished from the east border of the lands opened to settlement, the Hon. Secre-

tary expressly admitted all our contentions as to its location, and located that strip exactly as we do. The disqualification imposed upon Cagle was not based upon this clause, or, indeed, any clause found in that proclamation. While locating the 100 foot strip on the immediate border of tract opened to settlement, and thus sustaining the department's uniform construction, Secretary Smith invented a theory that no one before or since has ever seriously entertained. He proceeds upon the sheer assumption that there was yet a treaty with the Cherokees making it unlawful for white men to, in any wise, go upon the Osage and other reservations carved out of their lands, and after assuming this, he proceeds upon the equally fallacious theory that any such intruder upon those reservations was disqualified not under the proclamation, but by the terms of the treaty which he assumed to be still in effect. We show that such is the exact theory of that opinion by quoting it at length:

"The controlling question in the case is, whether or not the contestant, Cagle, was disqualified because of his having entered the Territory from the west line of the Otoe and Missouri Indian Reservation.

"Prior to the opening of said territory by proclamation of the President, the Department, in answer to inquiries as to whether settlers would be permitted to enter the strip from any of the Indian reservations on the eastern side of the territory, informed that the run could not be made from any of those reservations, and instructions were issued to remove all persons

from the hundred foot strip on the eastern boundary. This was the construction placed by the Department on the proclamation of the President prescribing rules and regulations for the occupancy of said lands.

"The question was referred by this Department to the Assistant Attorney-General for an opinion as to whether, under the President's proclamation, settlers would be permitted to make the run from the Osage and Ponca reservations. On August 28, 1893, he submitted an opinion to the effect that *in view of the treaty between the United States and the Cherokee Indians, prohibiting persons from entering the Indian Territory for any purpose except those specified in the treaty, or by express provision of the United States, all persons were prohibited from going upon those reservations for the purpose of making what is called "the run" into the Cherokee Outlet on the day of the opening, and that it was the duty of the Department to take such measures as would effectually prevent any such trespass on the part of those who expected to enter the "Outlet" for the purpose of making such settlement.*" [The italics are ours.] This opinion was approved by the Department, and notices were sent by the Department stating that settlers would not be allowed to make the run for claims from the Osage and Ponca reservations. (See letters to Harding & Riddell, Arkansas City, Kansas, dated August 26, 1893.)

On September 4, 1893, the special agent charged with the generel supervision of opening the Cherokee Outlet requested to be advised whether persons would have the right to make the run from the eastern border of the tract; and on September 5, 1893, he was instructed that they could not.

These instructions were communicated to the officers of the army and of the Land Department charged with the duty of enforcing the rules and regulations governing the occupation, and were by them given general publicity.

After careful consideration of the questions presented in this case, I am satisfied that the action of the Department in forbidding persons from making the run from any of the reservations on the eastern border of the "Outlet" was not inconsistent with the Act of Congress; and it being generally known that such instructions had been issued, settlers who acted in obedience thereto should not be defeated in their rights by others who, as a matter of fact, obtained advantage over them by making the run from adjacent Indian reservations.

The decision of your office holding Mendenhall's homestead entry for cancellation was erroneous.

Now, the Secretay in that decision was discussing the run made by Cagle from the west line of the Otoe Indian Reservation and he referred to the instructions of the Department issued prior to the opening to "remove all persons from the one hundred foot strip on the eastern boundary." The eastern boundary of what? This is answered later on in the decision in the declaration that the instructions referred to persons who were prohibited "from making the run from any of the reservations on the eastern border of the "Cherokee Outlet." Necessarily the eastern boundary there referred to by Secretary Hoke Smith was the one hundred foot strip on the eastern boundary of the "country known as

the Cherokee Outlet," for that one hundred foot strip was on the eastern boundary of something, and if it was upon the eastern boundary of the Osage Reservation then it would have been at the place where counsel for Mendenhall in that case and for Winebrenner in this case claim it was intended by the President to be, and it would have been so far removed from Cagle's location on the west line of the Otoe Reservation as to have made it unimportant to refer to it in that decision. Besides, the deduction in the letter referred to (August 28, 1893), was that settlers would not be allowed to make the run into the Outlet for claims from the Osage and Ponca Reservations. These, then, were necessarily the Reservations that were adjacent to the one hundred foot strip from which parties were supposed to have been prohibited from making the run, and the force and effect of the decision is to hold that this one hundred foot strip was west of these Indian reservations.

This contention, that parties became disqualified by reason of having made the run into the Cherokee Outlet from the Otoe, Missouri and other Indian reservations in Oklahoma Territory in violation of the Secretary's instructions issued subsequent to August 19, 1893, was manifestly unsound and as we have seen that decision was reversed. The Act of Congress under which the land was opened stated:

"The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this Act,

for the occupation and settlement of said lands, to be incorporated in the Proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

These orders of the Secretary not made twenty days before the opening, and not incorporated in the President's Proclamation were absolutely void in so far as they have in any way conflicted with the terms of the Proclamation.

The unsoundness of that decision of *Cagle* v. *Mendenhall* consisted not in holding that the one hundred foot strip was on the east side of the Osage Reservation—because the opinion holds the opposite as we have heretofore shown—but in holding that in view of the treaty between the United States and the Cherokee Indians prohibiting persons from entering the Indian Territory for any purpose except those specified in the treaty or by express provision of the United Sttates, all persons were prohibited from going upon those Reservations for the purpose of making what is called the run in the Cherokee Outlet. In view of the fact that the Cherokees had released all of their right and claim of every kind and nature to all of the lands in the old Cherokee Outlet west of the 96th meridian, it would seem strange that any law officer of the Interior or any other Department could come to the conclusion that those treaties could have any operation whatever at that late day in the protection of a right supposedly existing in the Cherokees, but which they had long since sold and been

compensated for. If it were true, however, that those treaties prohibited any entry upon that part of the old Cherokee Outlet that had been subsequently ceded and conveyed to the Osage and other Indians, such prohibition was not carried into the President's Proclamation, and the mere fact that a person might, by going into and remaining in an Indian reservation, renders himself liable to be removed therefrom, would certainly not disqualify him as a homestead entryman, for no such condition of disqualification is contained in the Act of Congress or the President's Proclamation opening this Cherokee Strip land to settlement.

The next decision of the Secretary of importance on this question is that of *Brady* v. *Williams*, decided by Secretary Francis on December 23, 1896, (23 L. D., 533). That part of the Secretary's decision referring to this question is as follows:

"The evidence clearly shows that Brady got on the land about 1:10 p. m., that McDonald was next there and Dahl was last of the three; that Brady made the run from the east side of the Arkansas river, which divides the Osage Reservation and the Outlet, starting at 12:01; that McDonald and Dahl each ran from the north line of the "Strip."

It therefore follows that as between McDonald and Dahl, the former is the prior settler, and if the doctrine of *Cagle* v. *Mendenhall* is sound and to be followed, that Brady acquired no right to the land by reason of his settlement prior to McDonald. I find myself, however, unable to

yield assent to the doctrine announced in that case.

By Act of Congress, March 3, 1893 (27 Stat., 640), that part of Oklahoma Territory known as the Cherokee Outlet was declared open for settlement by the President's Proclamation any time within six months from the date of the act. Among other things contained in the act is this (Sec. 10, p. 643):

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the Proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all rights to acquire any of said lands.

"The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before time fixed for the opening of said lands."

The proclamation of the President (17 L. D., 230), presumably prepared in accordance with the act, was promulgated August 19, 1893, declaring the land open to settlement at 12 o'clock noon, central standard time, Saturday, September 16, 1893. And among other regulations contained in this proclamation was this, on page 239:

"A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

"Said strip, the inner boundary of which

shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as a trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

This reservation was "around and immediately within the outer boundaries of the entire tract of country;" no limitation or exclusion of any portion thereof. The purpose of this reservation was well understood by all familiar with the vexed questions that so often arose in cases arising out of the former openings to settlement of the Oklahoma Territory, where the question was as to whether the individual was over the line or not at the instant of starting. Also to prevent individuals who owned the lands adjoining the Outlet from obstructing those seeking homes therein by refusing to allow them to congregate on their lands preparatory to making the run. To avoid these complications the President made this reservation to enable all intending to enter lands to congregate on this Strip and get an even start.

By this proclamation, the reservation thus made was on the east side of the Outlet as well as upon all the other sides. It must be assumed that it was known to the President and the Secretary of the Interior at the time the Proclamation was promulgated that the Indian Reservations of the Kansas, the Osages, the Poncas and the Otoes and Missourias immediately joined the Outlet on the east, yet there is no inhibition in the Proclamation from settlers entering upon

those Reservations—the one hundred foot reservation created by the Proclamation.

It was this Proclamation, made in pursuance of the Act of Congress, and containing rules and regulations made by the Secretary of the Interior for the opening and settlement of the land, that was the guide by which all those intending to enter the Territory should be controlled. It was formally promulgated, it bore the signature of the President of the United States, and the great seal of State. By it all persons were invited to the one hundred foot reservation, regardless of which part of the land it might be, either in imagination or reality, located. No other public or official pronunciamento was made, and the only authoritative, official or legal utterance is contained therein.

The statements made in the case of *Cagle* v. *Mendenhall* are somewhat misleading. In reference to the instructions issued and publicity given to them, as stated therein, it is only necessary to say that there is no official record in this Department of the same. There were several telegrams sent from the office of the Secretary of the Interior to private individuals, but none to any government officials in relation to this matter. The instructions of September 5, 1893, referred to, is a telegram from your office to "Emmet Womack, Special Agent." This is signed by the Commissioner, but does not purport to be given under authority of the Secretary of the Interior.

In every one of the communications sent from the Department, with the exception of that of September 13, to Ned. P.C.Gould, which will be adverted to hereafter, the information is that intending settlers will be prohibited from making the run from "Indian Reservations,"

but there is no mention of the one hundred foot strip, or inhibition from making the run from the same.

If, as before stated, the President's Proclamation created the one hundred foot strip on the east side of the Outlet, and persons made the run from there in good faith, can it be said that the route they traveled to get to the strip disqualified them from making entry? I think not. I do not believe it is within the power of the Executive branch of the Government to fix qualifications of one making a homestead entry. Congress, the law-making power has done this, and the right of the individual cannot be enlarged or abridged by executive order. The only disqualification fixed by Congress was that no one should "acquire any of said lands" who entered upon or occupied any part thereof "except in the manner prescribed in the Proclamation of the President, opening the same to settlement." The purpose of this was well understood. It was to give all persons from every part of the country an even chance to secure a home, and prevent those in the immediate vicinity from securing the choice lands. Following this Declaration by Congress, the Secretary of the Interior, under direction of the President, prescribed "rules and regulations not inconsistent with this Act" which was incorporated in the Proclamation. By this the one hundred foot strip was solemnly set apart for occupancy by the settlers, and there was no direction as to how parties would travel to get to it.

The only theory by which the Secretary of the Interior could possibly prevent parties from making the run from these Indian Reservations was that under the laws and treaties with the

tribes white people were not allowed therein, and were trespassers, and could be forcibly and summarily removed as such. But, if in ignorance of this fact, they actually did get into the Reservations, can this in any just and legal sense be said to disqualify the individual from making a homestead entry in the Outlet? I do not so understand it. And if they passed through the Indian Reservations and got onto the one hundred foot strip and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime either against the United States or the Indians he would not be disqualified from availing himself of the right to make a homestead entry." * * *

I cannot escape the conviction that Brady was not disqualified from making the homestead entry by reason of having made the run from the point where he started. He was the prior settler on the land and is therefore entitled to make homestead entry of the same.

"The case of *Cagle* v. *Mendenhall* is overruled and your office decision is reversed."

In view, then, of this uniformity of construction of the Department that the one hundred foot strip lay on the east side of the Cherokee Outlet and adjacent to the Osage, Ponca and Otoe and Missouri reservations, even if there were room for questioning the clear language of the President's Proclamation admitting of entry from "a strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and which one hundred foot strip

is "from the exterior boundary of the country known as the Cherokee Outlet," and in view of the fact that the "country known as the Cherokee Outlet" was that portion of the old Cherokee Outlet which remained after the boundaries of Oklahoma were defined, and which was to become a part of Oklahoma upon the proclamation of the President, we think, if there is any room for the construction of this clear language, the Court should follow the many decisions of the Supreme Court of the United States holding that the construction placed upon laws by the Executive Department, should be followed by the Court and the decisions of the Department upheld and the land titles allowed to remain where they have been placed by that Department of Government which is vested by Congress with the jurisdiction of passing upon these applications to make homestead entry, and of deciding to whom the Government titles shall be conveyed.

The desperation of those persons who are seeking to have the courts place this strained construction upon the act of Congress and President's proclamation opening the Cherokee Outlet to settlement is well illustrated by the citation by counsel of part of Sec. 14 of the Act of Congress of March 2, 1889, and the claim thereunder that it was the intention of the Government to open to settlement all of the land lying west of the 96th meridian.

The desperate position that all of the land lying west of the 96th meridian was intended by Congress and the President's proclamation to be

opened to settlement, must be sustained in order to place the one hundred foot strip "immediately within the outer boundaries of the entire tract of country to be opened to settlement" and on the 96th meridian. Otherwise, the one hundred foot strip could not be on the east line of the Osage Reservation.

In the light of the subsequent legislation, Section 14 of the Act of March 2, 1889, has little, if any, relation to this controversy, and renders no assistance, whatever, in determining where the one hundred foot strip around and immediately within the outer borders of the tract of country to be opened to settlement, being the territory "known as the Cherokee Outlet," was located. For the Cherokee Outlet, about which the President was speaking in his proclamation, was the the land which was purchased of the Cherokee Indians, and was being opened to settlement, and not any lands that had not been purchased from the Osage, Kaw, Ponca, Otoe and Missouria Indians. The portion of Section 14 referred to, shows on its face that it was then recognized that other Indians besides the Cherokee Indians owned or claimed land lying west of the 96th meridian, and the language contained in the proviso to Section 14 shows that it was the intention of Congress only to open to settlement the lands which should be acquired from the Cherokee Nation of Indians separately from those that might be acquired from other Indians. The section provided that when this purchase was made of the Cherokee Indians "the said

lands shall thereupon become a part of the public domain."

Now it seems to us that Congress could hardly have intended that when the lands lying west of the 96th meridian, in which the Cherokee Indians were interested, were purchased from such Indians, that thereupon and immediately those other lands which were owned by the Osage, Kaw, Ponca, Otoe and Missouria Indians and not purchased by such agreement, or even mentioned in the proviso, should thereupon become a part of the public domain.

This declaration that the Indian lands when acquired by the Government, shall thereupon become a part of the public domain," is an expression used in many, in fact most, of the acts of Congress approving treaties by which the Government acquired lands from the Indians and in no instance is this declaration used as a designation of the status of lands to which any Indians have any ownership whatever.

Certainly, Congress did not intend that the land of the Osage and other Indians west of the 96th meridian which could not be acquired by treaty with the Cherokee Indians should become a part of the public domain, and so, it naturally follows that the prohibition against any persons being "permitted to enter upon and occupy the same" must be held to relate only to such lands as have "become a part of the public domain."

We say that this Section 14 can have little, if any, bearing—has in fact no bearing—upon this controversy, because it not only does not

contain the expression "country known as the Cherokee Outlet," as used in the President's Proclamation, but it makes no reference to the Cherokee Outlet as such, and furthermore, because the Act of March 3, 1893, opening the Cherokee Outlet, entirely covered the question of opening lands acquired from the Cherokee Indians, and also the terms upon which they would be opened to settlement, including also the prohibition against any person occupying or entering upon any of said lands, except "in the manner prescribed by the proclamation of the President opening the same to settlement."

We do not believe there is anything in Section Section 14 of the Act of March 2, 1889, to support the conclusion drawn by counsel, that Congress intended in that legislation to open all of the lands owned or claimed by the Indians west of the 96th meridian to settlement. The proviso of this section referring to opening any of said lands to settlement, limits its scope to snch as should be acquired from the Cherokee Nation, and expressly omits any reference to the lands of "all other Indians owning or claiming lands," lying west of the 96th meridian. The negotiations which were carried on by the Commission under the authority of this section never resulted in the making of any treaty, whereby the lands of the Osage, Kaw, Ponca, Otoe and Missouria Indians were to be opened to homestead settlement, and at the time Congress came to pass upon the work of the Commission and enacted the legislation which directly resulted

in the opening of the Cherokee Outlet to homestead settlement, no treaties with those other Indians mentioned, than the Cherokees, were in any way referred to, and the Court takes judicidl knowledge of the fact that the Osage, Kaw, Ponca, Otoe and Missouria Indians own their lands under treaty and patents long since made, which took these lands out of the Cherokee Outlet, if ever in it, and which fact had almost three years before caused Congress in the sections defining the boundaries of Oklahoma, to describe the remaining land of the Outlet west of the 96th meridian, and which were not included in the boundary of Oklahoma by that Act, as the land "known as the Cherokee Outlet," and which language the President adopted in his Proclamation opening this land to settlement, and evidently referred to the same land and the same country as that described as such in the Organic Act, and no other.

The prohibition contained in Section 10 opening the Cherokee Outlet prohibiting any person from occupying or entering upon "any of the lands herein referred to" was meant by Congress to apply to the lands of the Cherokee Outlet, which Congress had in detail, immediately preceding this clause in the same section, provided for opening to settlement. This clause was intended to refer to those lands concerning which it was declared in the page preceding, as follows: "And said lands, except the portions to be alloted as provided in said agreement, shall upon the payment of * * become

and be taken to be and treated as a part of the public domain." The legitimate, fair, unstrained construction of these two portions of this section is that as to all of said lands *which by the terms of this Act became a part of the public domain*, as referred to in this Act, no person should be permitted to enter upon or occupy except in the manner prescribed by the President's proclamation.

The intention of these prohibitory words was, as was stated of similar language construed in the case of *Smith* v. *Townsend*, 148 U. S., 490, to give absolute equality to the intending homesteaders, and this equality was intended to be maintained by requiring the homsteaders to start from the border of the territory that was being opened to settlement at the moment of the opening. These provisions have in recent years been made and have applied only to countries or lands that were being opened to settlement. In no instance have they ever been held to apply to any land that was not being opened to settlement, and the wall described by Justice Brewer in the *Smith* v. *Townsend* decision was a wall around the country being opened to settlement, immediately on the outer boundary of it, and not a wall around some country or land that was not being opened to settlement. It has never been held that it was necessary in the case of the settlers entering Old Oklahoma on April 22, 1889, that they should have run from the eastern border of the Sac and Fox or Kickapoo country, although that was a part of the land lying west of the 96th

meridian, mentioned in this Section 14 of Act of March 2, 1889, and for which the Commission provided for in this section, treated with these tribes of Indians, and was subsequently opened to settlement on September 22, 1891, and was as much included in the prohibitory words of this Section 14 as were the lands of the Osage, Kaw, Ponca, Otoe and Missouri Indians.

If the position taken by plaintiff is correct that the Act of March 2d, 1889, prohibited entry for settlement from any of the lands west of the 96th meridian, then the persons who entered old Oklahoma from any but the southern border were sooners, because "old Oklahoma," the lands opened for settlement on April 23d, 1889, was surrounded by these Indian lands west of the 96th meridian, excepting upon the south side. The Kickapoo and Iowa and Sac and Fox lands lay on the east side of that tract. The Pawnee Reservation and the Cherokee Outlet on the north, and the Cheyenne and Arapahoe and Wichita lands on the west and all of these Indian lands have subsequently been opened to settlement under Acts of Congress approving Treaties made by the Commissioner appointed under this Act of March 2nd, 1889. It certainly never was the intention of Congress that this section 14 should prevent entry of a particular part of these Indian lands west of the 96th meridian, which were at a particular time being opened to settlement, from a portion of other lands adjacent to the lands being opened. It certainly was not the intention to declare that

all persons entering "old Oklahoma" on April 22, 1889, from the east should make the run from the 96th meridian, on the east and from the southern line of the State of Kansas, on the north, and from the State of Texas on the west. This view is, moreover, a wide and radical departure from the lines of construction in this court. Mr. Justice Brewer in defining this same "wall" thus erected by Congress, in the case of *Smith* v. *Townsend*, 148 U.S., 490, placed it upon the borders of the lands opened to settlement on April 22, 1889. If plaintiff's views are correct such location was erroneous to the extent of 40 miles on the east, 60 miles on the north and 100 miles on the west.

Under the authority of the *Smith* v. *Townsend*, the history of that country may be recurred to in considering this cause, and if we recur to the history of the opening of the lands opened to settlement on April 22, 1889, we know that the vast majority of people who entered that country on that day entered from the east, north and west sides. Are those people all "sooners," and have those lands in a great majority of cases gone to illegal entrymen because of the fact that the Act of March 2nd, 1889, prohibited entry from any of the Indian lands west of the 96th meridian? It seems to us that such a claim is preposterous and shows by the absurdity of result produced that the construction claimed by counsel is absolutely untenable.

Moreover, it must be noted that other direct

precedents were made at the opening of the Sac and Fox, Iowa and Pottawatomie Reservations in 1891, and of the Cheyenne and Araphoe Reservations in 1892. At each of these openings the crowds assembled on the immediate borders of the "promised land." To do this they were compelled in many cases to go upon and be upon other reservations west of the 96th meridian that had not been treated for. These lands were acquired from those tribes by treaties made by the commission created by Section 14, of the Act of March 2, 1889, and were governed by its provisions. To this day no one has ever had the temerity to challenge the legality of the presence of these settlers on the adjacent reservations before those openings or to question the legality of their run from those immediate borders.

Furthermore, the prohibition against any one occupying or entering upon "any of the lands herein referred to" is limited by the other clause, "except in the manner prescribed by the proclamation of the President opening the same to settlement," and that proclamation, as hereinbefore shown, placed the inner line of the barrier to entrance or occupancy one hundred feet "within the outer boundaries of the entire tract of country to be opened to settlement." There was no controversy in the *Smith-Townsend* case as to where the outer line or boundary of the country being opened to settlement should be, and that question was not discussed there. The question there was of an entirely different nature. It was as to whether a man was disqualified al-

though he were within the outer boundaries of the entire tract of country that was being opened to settlement on April 22, 1889, if he was not in fact upon the very quarter-section of land upon which he settled that day, or in the particular case, if he were upon a railway right-of-way running through the quarter section.

Neither do we consider that in either the Cherokee Strip Act or the President's Proclamation there was any effort to avoid any "technical questions." In fact, the "technical questions" have been born since this act and proclamation, and are entirely the manufactured product of those diligent minds who have sought to defeat prior occupants upon these homestead lands In fact, it was understood by Congress and by the President that the land or country "known as the Cherokee Outlet"—and we understand that to mean known by the common people of the country as well as by the President and Congress—was meant to describe that piece of country in the present domain of Oklahoma which was not made a part of that Territory by the Organic Act, but which was to become such part when it was opened to settlement. The description of the country "known as the Cherokee Outlet" was worded in such clear and unmistakable terms in the Organic Act, passed less than three years before the Cherokee Strip Act was passed, that it was unquestionably considered by the Congress of the United States and the President, that any technical description of

the land "known as the Cherokee Outlet" was absolutely unnecessary.

It will be observed that the words "Cherokee Outlet" are used in quotation in this Act. This quotation is evidently made from the use of these words in the agreement with the Cherokee Indians transmitted to Congress with the President's Message, known as Executive Document No. 56, and this agreement shows that in the treaty or agreement with the Cherokee Indians, the Cherokee Outlet was not considered as comprising all of the lands west of the 96th meridian. The Indian reservations are expressly referred to and then the remainder of those lands are designated as the "Cherokee Outlet."

In reference to counsel's argument in the court below with reference to technical questions and the bearing that any technical question may have in this case it is worthy of note that when the President came to describe the country "around and immediately within the outer boundaries" of which he was placing the 100 foot strip for the convenience of and to designate the "dead line," so to speak, for the intending settler, he did not use the language which Congress used designating the tract to which it was forever extinguishing any claim of Cherokee title, to wit:—commonly known and called "The Cherokee Outlet," but did use the language contained in the Organic Act of Oklahoma, "known as the Cherokee Outlet." This was evidently done for a purpose and for the reason that the words "Cherokee Outlet" as

contained in this Act of Congress, referred to all of the lands to which the Cherokee Indians were relinquishing their title, not only the lands west of the Reservations, but also any possible shadowy title of the Cherokee Indians to the lands of these Reservations, while the "country known as the Cherokee Outlet," which the President was proclaiming open to settlement, did not include the land in the eastern end of the old Cherokee Outlet to which Indians then held patents and which Congress had not authorized the President to open to settlement.

The one hundred foot reservation is in no wise referred to, or mentioned, in the Act of Congress opening the Cherokee Outlet, or in any acts of Congress referred to by counsel in his brief in the court below. That is entirely a creation of the President under the power given him to fix, and determine and prescribe the manner for opening the lands to settlement, and we agree with counsel that that one hundred foot reservation is positively fixed "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement" under the proclamation. This language, in fact, is so clear that it needs no reference to anything but itself, and its place can be located always and all the time by determining where the outer boundary "of the entire tract of country to be opened to settlement" is, and if the land where any individual attempts to locate this one hundred foot strip is not a part of an "entire tract of country" that was opened to

settlement on September 16, 1893, then the one hundred foot strip does not lie there.

Following this rule which was the one made by the President, the only authority having any power to make it, no one could ever be mistaken or misled by any "*technical question*" relating thereto.

The characterization of counsel in the court below of any of those persons who entered the Cherokee Outlet on September 16, 1893, from the Chillocco Indian reservation, where they were expressly permitted to be and to run from, by the United States troops, and of the very many persons who entered from the Indian reservations on the East side of the strip and have been awarded their lands as legal settlers by the Interior Department, as "25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out" as against the interest of "something like 150,000 people collected upon the boundaries of this country" is incorrect and is not supported by any allegations of the petition or any findings of the Interior Department, and it is an attempt to prejudice this court against a class of people who have never by any branch of the government been held to have crossed the one hundred foot strip around the "country known as the Chereokee Outlet" before twelve o'clock Noon, September 16, 1893.

As heretofore shown, the Department has uniformly and always held that the one hundred foot strip was along the west line of the Ponca,

Osage and other Indian reservations. There never has been any claim made, at least, it is not supported by any findings pleaded in plaintiff's second amended petition, that our client in this case stole into the country in the night time. This controversy between the runners from the one hundred foot strip on the east side of the country opened to settlement and those who ran from the north and south lines has been openly waged, not as a question of secrecy, but wholly as a question of law, in which those in the position of our client have always won when it came to a question of the location of the one hundred foot strip, and excepting one decision which the Department itself overruled, the holdings have been that those running from the one hundred foot strip, or the reservations east thereof, were qualified settlers.

We do not believe that the *ex parte* telegram of the Secretary of the Interior, if sent, to Mendenhall, as claimed by counsel, can be considered by the court in this case. It was not a decision upon any case pending in which any parties had a hearing, or their day in court, and the Interior Department in more than nine years which have elapsed since this alleged telegram, has never vested a title on the strength of it. Certainly, therefore, it would be a weak support for a decision of this court to overturn these titles after the lapse of all these years.

Counsel is mistaken in saying in the court below that the Arkansas river was never referred to in any act of Congress or proclama-

tion of the President, or the decision of any court prior to the Land Department, as an eastern boundary of the "country known as the known as the Cherokee Outlet." The President in the proclamation referred to the "country known as the Cherokee Outlet," as the country that was being opened to settlement. This country was divided into land districts for the convenience of the settlers and the government in the administration of this public business. The Brady-Williams land was in the Perry Land District and that district was bounded and described as "beginning at the middle of the main channel of the Arkansas river, where the same is intersected by the northern boundary of Oklahoma," and thus it was very natural to refer to the middle of that river, where it was adjacent to the country opened to settlement as being the outer boundary of the opened country known as the Cherokee Outlet.

Counsel in his brief below, says, "By Section 9 of the same Act, referring to the Organic Act, the lands east of the Arkansas river are referred to as that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma." This, of course, is the only escape from the conclusion that a designation of the land "known as the Cherokee Outlet" in Section 1 of the Organic Act, was of that part of the land west of the 96th meridian, which was not made a part of the Territory of Oklahoma, such part being then unoccupied by any of the Indian tribes in Oklahoma

Territory. But, is his contention sound? Is it true that the land east of the Arkansas river is the land referred to as "that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma"? We claim not. For all of the lands west of the 96th meridian and east of the Arkansas river were by the Organic Act made a part of the Territory of Oklahoma. A following of the boundaries given in Section 1 of the Organic Act will clearly demonstrate this fact—that there were none of these lands east of the Arkansas river which after the passage of the Organic Act were not a part of the Territory of Oklahoma, and none of the land east of the Arkansas river could have been referred to in the Organic Act as "that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma," but that language in the Organic Act refers to the land which Congress designated as "the land known as the Cherokee Outlet," after it had placed in the Territory of Oklahoma the land lying east therefrom, which was then covered by Indian reservations.

There is nothing in the case of *Jordan* v. *Goldman*, 1 Oklahoma, 427, which throws any light on this case. The stone quarry in controversy in that case was not in any of the Indian reservations which we claim in this case were not part of the land "known as the Cherokee Outlet" at the time the President's proclamation was issued.

Nor do we see any efficacy in the argument that an unbroken border would better have served the purposes and intention of Congress and the President in opening the land known as the Cherokee Outlet to settlement. There is nothing appearing, at least in this case, that would indicate that the President thought that the intending homestead settler could more easily or more readily find, or would be likely to find, a one hundred foot strip in an unoccupied country fifty miles east of the land to be opened to settlement, than he could along the Arkansas River and adjacent Indian Reservations immediately around the outer border of the entire tract of country that was being opened to settlement. Whether the border was broken or unbroken, it appears to us, was of little consequence. Whether that border was on the border of the territory that was being opened to settlement, or fifty miles away from it, was a matter of great consequence. It would, indeed, it appears to us, have been very easy for the President to have described this one hundred foot strip, as being along a particular degree of longitute, he had so intended. If these exact, straight and unbroken boundaries, contended for by the plaintiff, had been the ones which the President intended the homesteader should occupy up to the hour of opening, it would have been very easy to described such border as the south line of Kansas on the north, and the 96th meridian on the east, and from the fact that such easy terms are not used, but that the boundary,

whether broken or unbroken, is described as the one hundred foot strip "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," indicates that the President intended to place the settler upon the border of that country where he could get an exact and equal opportunity with every other settler, no matter from what direction, east, west, north or south, he might approach the promised land, instead of placing one man on the border of that land and another many miles away, making a difference of equality only in case of location of all settlers on certain sides instead of, as it was intended, the location of any settler upon any side.

The other authorities cited by counsel in his brief in the court below which we have not herein refered to, have, in our judgement, no possible bearing upon this case; so we will not consume time in their discussion.

But this one hundred foot strip could not have been located upon the Indian Reservations east of the land to be opened to settlement without charging the President with using useless words in the Proclamation and language that cannot be harmonized with the rest of the Proclamation. The President in declaring the right of the settler to occupy the one hundred foot strip said:

"Such occupancy shall not be regarded as trespass, or any violation of this Proclamation, or of the law under which it was made; nor shall any settlement rights be gained thereby."

Concerning this language of the Proclama-

tion the Supreme Court of Oklahoma in the decision appealed from says:

"If this strip on the east was from twelve to fifty miles east of the land to be opened to settlemant, why provide that such occupancy shall not be regarded as tresspass, and no settlement right should be gained thereby?"

Certainly if this one hundred foot strip was intended to be by the President placed on the 96th meridian, then it was unecessary to have declared as to that part of the strip lying upon these Indian Reservations, for no settlement rights whatever could be gained upon those Indian Reservation lands that were not opened to settlement.

It is only by abandoning or ignoring the words in the proclamation, "the entire tract of country to be opened to settlement under this proclamation," and by disconnecting them from the terms preceding, "around and immediately within the outer boundaries of," that this proclamation can be made subject to construction. For with these terms as before suggested taken in connection with "the entire tract of country" that was being opened to settlement, there is no difficulty for any man, however untutored in legal phrases he might be, to fix the location of the one hundred foot strip at any point around the country to be opened to settlement.

While, in our view, this case must turn exclusively upon the question of construction of the clause of the proclamation which defines the hundred foot strip, the course of plaintiff's coun-

sel in shifting at this last moment to a reliance upon other prohibitory clauses, and statutes, renders it necessary to consider them at this time.

If that former inhibitory clause is to be held applicable, and such a literal construction given it as counsel for plaintiff now contends for, some startling results must follow:

(1) If this former inhibition is applicable, the President was bound thereby; for, he could make no regulations inconsistent with positive enactment of Congress. The regulation creating the 100 foot strip was, then, without authority of law; for the wall erected by Congress was (if that view be correct) upon the outer boundary of these lands. Every person who entered upon that 100 foot strip, was ***within*** such wall at the hour of the opening. It would follow that every settler in the Cherokee Outlet on the opening day was forever disqualified under this prohibitory provision by the rule of this court in *Smith* v. *Towsend, supra*. Such is one necessary and logical effect flowing from the position assumed by plaintiff's counsel.

(2) If that former inhibitory provision is applicable, and is to be construed so literally as to disqualify Forney because he crossed the Osage reservation before the opening, even a more startling result must follow. The lands west of the 96th meridian directly included within the scope of that same provision, completely surrounded the tract originally opened to settlement on April 22, 1889. There was no way that

any person could reach that tract then opened to settlement, without doing exactly what Forney did,—cross an Indian Reservation covered by that same prohibition. The same is largely true of the lands opened in 1891 and in 1892. If, then, Forney was disqualified by going upon and across one of these reservations, it must follow, that every person who, between March 2, 1889, and September 16, 1893, crossed any reservation west of the 96 meridian, was in like manner disqualified both as to the Cherokee Outlet, and all other lands west of that meridian.

To now broaden the application of this statute, and so strictly enforce it as to disqualiy defendant, is in effect to disqualify every settler in Oklahoma and every person who has ever taken a homestead upon any lands west of the 96th meridian. They all traversed some portion of those lands before the opening just as the defendant did.

Such are the logical and necessary conclusions that must result if this court should adopt the view of the law urged by plaintiff in this case. Surely all just minds will recoil from thus imposing a legal disability upon tens of thousands of settlers who for many years have proceeded in good faith to comply with the homestead law. Surely they are now entitled to rely upon that view of the law which was in effect when their rights attached, and which throughout fourteen years has grown to a rule of property in Oklahoma.

It must go without saying that under these circumstances this court will not overturn the Department's construction of this series of inhibitory clauses, unless that construction is entirely repugnant to both the letter and the spirit of the law. Let us then well consider the general policy of the Land Department in its construction and application of these inhibitory provisions.

In *Woods* v. *Kingfisher* (9 L, D. 432), the earliest case, the Department dwelt at length upon the history of the times out of which these acts grew,and looked closely to the purposes and evils that Congress had in mind in placing them upon the statute books, and thereupon reached this conclusion:

"The evident intention of Congress was to give all persons desiring homes an equal chance to obtain them."

In *Guthrie Townsite* v. *Payne* (12 L. D. 665) it was said:

"In no act relating to the public domain is the intention of Congress more clearly indicated than in the one under consideration, and that intention was to place all citizens on an absolute equality, so far as fixing the time when a claim to land could be asserted and when the initiatory acts toward asserting such claim could be taken."

The Department was in the closest contact with all of the conditions out of which the inhibitory provisions grew. It knew the evils Congress intended to prevent thereby. It fol-

lowed the spirit of the law and gave rigid effect to the purposes of Congress upon the one hand; and wisely avoided the great perils and hardships of enforcing its letter, on the other hand.

From these early cases it has for many years consistently adhered to this policy of construction.

The perils of a literal construction of these provisions were, indeed, so great as to cause this court to make the following suggestion, in the first case that came before it:

"It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one after March 2, and before April 22, should chance to step within the limits of the Territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute but, if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was, in fact, outside the limits of the Territory, it may perhaps be said that, if within the letter, he was not within the spirit of the law, and, therefore, not disqualified.

Smith vs. *Townsend*, 148 U. S. 490.

This timely suggestion from the court of last resort as to the absurd consequences flowing from a strict construction was siezed upon by the Department and for some ten years has formed the express basis of its construction of all the statutes containing these inhibitory provisions. It had come to be known by nearly all settlers, even as early as the opening of the Out-

let, that any mere entrance upon the lands opened to settlement, as crossing it upon the railroad or highway in advance and in the ordinary course of business, was not considered an infraction of the law, Indeed, circumstances compelled everyone to travel across some lands yet to be opened to settlement. Many years intervened before some of the lands included in the original provisions, were treated for, or could be proclaimed opened to settlement. To hold that the "wall" surrounding them was standing there all of these years, so as to prevent everyone from crossing these lands for years before any possibility of an opening existed, was to prevent all access to the settled portion of the Territory. For, every railroad and highway entering Oklahoma crossed some of these lands.

With commendable foresight this court saw the danger and absurdity of this literal construction, and suggested that if a party who had technically violated its letter, "was in fact outside of the Territory" at the time when the legal barrier was removed, he might still be qualified. Certainly at this late date after the policy of construing these laws in accordance with their spirit has grown into a rule of property underlying most of the titles in Oklahoma, this Court should not initiate a policy of "literal and comprehensive" construction.

We insist that the prohibitory clauses found in this immediate Act and Proclamation are the only ones applicable to the case at bar. We base this conclusion upon the Act and Proclamation, and upon the construction placed upon them by the Department during the last nine years. We insist that it was not the purpose or intention of Congress or the President to pile prohibition upon prohibition—that the prohibitions of the immediate act and proclamation being full, complete and exclusive in their terms, were intended to supersede all other provisions of like character. In this we are sustained by the Department's construction of these laws:

"Your office properly held that as to the Cherokee Outlet, the inhibited period dates from the date of the proclamation of the President opening it to settlement, August 19, 1893."

Townsite v. *Morgan, et al.*, 21 L. D., 496, 499.

See also, *Bowles* v. *Frazier*, 22 L. D., 310, 312.

These views and conclusions are also sustained by the fact that while Congress expressly referred to Section 13 of the Act of March 2, 1889, and made that section applicable to the opening of the Outlet, it entirely omitted

any reference to Section 14, of that Act, which contained this original prohibition as to entering these lands. Under the accepted rule, this express inclusion of Section 13 amounts to an exclusion of Section 14.

It was manifestly the intention of Congress and of the President in the Act and Proclamation in question, to make new, full and complete terms of prohibition differing from what had theretofore been imposed. The Department, in administering this part of the law governing the opening has recognized that intention on the part of Congress and the President, and made the Proclamation the exclusive test of qualification or disqualification. It has refused to adopt any such view as opposing counsel would now have this court adopt. It has adhered to the general purpose that Congress and the President had in imposing this prohibition; it has looked to the times, the circumstances, the purposes sought to be accomplished, and the evils sought to be avoided, in construing and applying these provisions of law. It has applied them in a rational and sensible manner so as to effectuate fully the objects and purposes of the law. It has uniformly refused to follow the strict letter of the law, where it led to absurdities, incongruities and impossibilities.

We have not had the benefit of the Brief of counsel for Plaintiff in this Court. The references which we have made to their arguments are to those made in the Oklahoma Courts and not in the Brief here.

We submit the case in absolute confidence of the affirmation of the judgment of the Court below and which we ask.

Very respectfully,

FRANK DALE,
A. G. C. BIERER,

Attorneys for Defendant in Error.

Office Supreme Court U.S.
FILED
NOV 10 1902
JAMES H. McKENNEY,

No. 409.

Consent to advancement.

IN THE

Filed Nov. 10, 1902.

SUPREME COURT

OF THE

United States.

ROBERT L. WINEBRENNER,
Appellant.

vs.

EDWARD C. FORNEY,
Appellee.

No. 409.

CONSENT TO ADVANCEMENT OF CAUSE.

Now comes the appellee, Edward C. Forney, by Frank Dale and A. G. C. Bierer, his attorneys, and hereby enter their appearance in this cause in behalf of the appellee, and said attorneys consent that said cause may be advanced upon the docket and set for hearing on January 19, 1903, or any date prior or subsequent thereto, that

will insure the disposition of the cause at the present term of the court, the brief of counsel for appellant to be served under the rules of this court.

The cause presents a single question for determination by the court, and that is whether or not the appellee is disqualified from entering land in the Cherokee Outlet because of the fact that he entered said Outlet on September 16, 1893, from the boundary of an adjacent Indian reservation, to-wit: the Ponca Reservation.

We know that there is a very large amount of litigation in the courts of Oklahoma that is being carried on because the question of the legality of the entrance into the "country known as the Cherokee Outlet" on September 16, 1893, by intending settlers, from the adjacent Indian reservations, has not been passed upon by the supreme court of the United States. Our client, Edward C. Forney, is, as well as other clients, interested in this question, and the people of Oklahoma interested in it in general, are all very anxious that this question should be passed upon by this court at as speedy a date as possible to the end that their titles may be quieted and that these parties and the courts of Oklahoma may be relieved from a great volume of litigation that can have for its only foundation the fact that this court has not yet finally settled this question by its decision.

Very respectfully submitted,

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellee.